



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

March 23, 2012

VIA Facsimile (202-654-6211) and First Class Mail

Robert F. Bauer, Esq.
Rebecca H. Gordon, Esq.
Perkins Coie
700 Thirteenth Street, N.W.
Washington, D.C. 20005

RE: MURs 6078/6090/6108/6139/6142/6214
Obama for America and Martin H. Nesbitt,
in his official capacity as Treasurer

Dear Mr. Bauer and Ms. Gordon:

On August 24, 2010, the Federal Election Commission found reason to believe that Obama for America and Martin H. Nesbitt, in his official capacity as Treasurer ("OFA"), violated 2 U.S.C. § 441a(f) of the Federal Election Campaign Act of 1971, as amended ("the Act"). On March 20, 2012, the Commission also found reason to believe that OFA violated 2 U.S.C. § 434(b). Enclosed is the Factual and Legal Analysis that sets forth the basis for the Commission determination regarding the Section 434(b) violations.

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In the meantime, this matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public. Please note that OFA has a legal obligation to preserve all documents, records, and materials relating to this matter until such time as they are notified that the Commission has closed its file in this matter. See 18 U.S.C. § 1519.

Robert F. Bauer, Esq.
Rebecca H. Gordon, Esq.
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We look forward to your response.

Sincerely,

Camilla Jackson Jones

Camilla Jackson Jones
Attorney

Enclosures:
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Obama for America and MURs: 6078/6090/6108/6139/6142/6214
Martin Nesbitt, as Treasurer

I. INTRODUCTION

In August 2010, the Federal Election Commission ("the Commission") found reason to believe that OFA violated the Federal Election Campaign Act of 1971, as amended, ("the Act" or "FECA") by accepting during the 2007-2008 election cycle an unknown number of excessive contributions in violation of 2 U.S.C. § 441a(f). *See* OFA Factual and Legal Analysis, dated September 7, 2010 ("F&LA").¹ In the F&LA, relying on information compiled by the Reports Analysis Division ("RAD"), the Commission found that OFA may have accepted between \$1.89 and \$3.5 million in excessive contributions. The Commission also found that OFA might have misreported the original date of receipt for certain primary election contributions made through its joint fundraising representative, the Victory Fund,² which caused those contributions to appear as "primary-after-primary" excessive contributions (*i.e.*, primary contributions made after the date of the primary election). *Id.* at 8 n.3.

In response to the Commission's findings, OFA asserted that \$1.6 million in primary contributions received through the Victory Fund were not excessive. *See* OFA Letter from Judith Corley dated November 12, 2010 (responding to RTB findings). In fact, OFA explained, these contributions appeared to be "primary-after-primary" excessive contributions because, as it conceded, OFA misreported these contributions' original date of receipt. *Id.* According to OFA,

¹ The Commission dismissed allegations that OFA violated 2 U.S.C. §§ 441e and 441f.

² The Victory Fund was established pursuant to 11 C.F.R. § 102.6. Its participants were OFA and the Democratic National Committee.

1 campaign staff understood that OFA was reporting the transfers in the correct manner. *Id.* See
2 also OFA Letter from Judith Corley to OGC dated March 1, 2011.

3 **II. FACTUAL AND LEGAL ANALYSIS**

4 The investigation and Section 437g audit revealed that OFA failed to report correctly the
5 original dates on which \$85,158,116 in contributions were received by OFA's joint fundraising
6 representative, the Victory Fund, in violation of 2 U.S.C. § 434(b) of the Act.

7 The Act requires all political committees to publicly report all of their receipts and
8 disbursements. See 2 U.S.C. § 434. Each report must disclose for the reporting period and
9 calendar year, the total amount of all receipts, and the total amount of all disbursements.
10 See 2 U.S.C. § 434(b)(2), (4) and 11 C.F.R. § 104.3(a), (b). The Act requires that an authorized
11 committee of a candidate report the amount of all receipts from transfers by affiliated
12 committees, as well as the identity of the affiliated committee and date(s) of transfer. See
13 2 U.S.C. § 434(b)(2)(F), (3)(D); 11 C.F.R. §§ 102.17(c)(3)(iii) and 102.17(c)(8)(i)(B). See also
14 11 C.F.R. §§ 104.3(a)(4) and 104.8.

15 Commission regulations permit political committees to engage in joint fundraising with
16 other political committees or with unregistered committees or organizations. See 11 C.F.R.
17 § 102.17. After a joint fundraising representative distributes the net proceeds, a participating
18 political committee is required to report its share of funds received as a transfer-in from the
19 fundraising representative. See 11 C.F.R. § 102.17(c)(8)(i)(B). For contribution reporting and
20 limitation purposes, the date a contribution is received by the fundraising representative – not the

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1 date received by the recipient political committee – is the date that the contribution is received by
2 the participating political committee. *See* 11 C.F.R. §§ 102.17(c)(3)(iii) and 102.17(c)(8).³

3 During the 2008 election cycle, OFA received \$85,158,116 in transfers from the Victory
4 Fund. These transfers were made on various dates between June 30 and November 3, 2008.
5 OFA correctly reported the dates it received transfers from its joint fundraising representative.
6 But OFA did not correctly report the original dates of receipts required by 2 U.S.C.
7 § 434(b)(2), (4) and 11 C.F.R. §§ 104.3(a), (b) and 102.17(c).

8 The Commission initially brought this problem to OFA's attention in an October 2008
9 RFAI, which questioned \$1,936,829 in primary contributions that were identified as possibly
10 excessive because OFA received the transfer of funds after the date of the candidate's
11 nomination. *See* Request for Additional Information (Oct. 14, 2008). The RFAI sought
12 clarification as to whether the contributions were "incompletely or incorrectly reported." *Id.*
13 The Commission raised this same issue in the F&LA, noting that certain excessive contributions
14 may have been misreported as having been received after the date of the primary. *See* F&LA
15 at 8 n.3.

16 OFA admits that, contrary to the Commission's regulations, it erroneously reported the
17 dates of transfers from the Victory Fund as the dates of receipt for those contributions and failed
18 to report the original dates of receipt of the contributions by the Victory Fund. Letter from J.
19 Corley to OGC dated March 1, 2011 (stating "The Committee began reporting transfers from a
20 joint fundraising committee on July 20, 2008. It reported six (6) additional transfers during 2008
21 and 2009 . . . All of the transfers (except one) [citation omitted] were reported in the same way –
22 as of the date of the transfers – based on an understanding of the campaign staff that this was the

³ The participating political committee is required to report the original date of receipt of the proceeds only after the funds have been transferred from the fundraising representative. *Id.*

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1 correct method for reporting."). *See also* Letter from J. Corley to OGC dated November 12,
2 2010 (acknowledging "the overwhelming majority of these 'Primary-after-Primary
3 contributions' were actually received by the joint fundraising committee before President Obama
4 accepted his party's nomination"). By way of explanation, OFA responds only that it was "in
5 regular contact with the FEC's Reports Analysis Division [] to clarify reporting issues[, and] . . .
6 RAD staff never raised any issue with them regarding the method they were using to report the
7 transfers." Letter from J. Corley to OGC dated March 1, 2011.

8 OFA's explanation does not alter the fact that it failed to report the dates on which the
9 Victory Fund originally received contributions totaling \$25,152,116. Accordingly, the
10 Commission found reason to believe that Obama for America and Martin Nesbitt, in his official
11 capacity as treasurer, violated 2 U.S.C. § 434(b).